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In The

Supreme Court of the United States

FREIGHT, CONSTRUCTION, GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL 287; ED QUINTAL; ED DEBROCK; GEORGE NETTO; LEE SCOGGINS,

Petitioners,

vs.

BILL BROOKE; ROBERT SANDOVAL; ROBERT WILLIAMS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in a case arising under the LMRDA's Bill of Rights in which union members had an objectively valid basis for the belief that union funds were being misused and were disciplined expressly because they instituted a lawsuit for an accounting of union funds, the Ninth Circuit correctly determined that the jury's finding that union members did not violate union rules because they acted for the lawful purpose of securing an accounting of union funds made it unnecessary to decide whether the jury was properly instructed under the standards of *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), for determining whether proper or improper motives predominated in the minds of the union officials who took the disciplinary action against the members.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Bill Brooke, Robert Sandoval and Robert Williams (hereafter "Respondents"), oppose the Petition for Certiorari (herein the "Petition") filed by Petitioners Freight, Construction, General Drivers, Warehousemen & Helpers Local 287 and Ed Quintal, Ed DeBrock, George Netto and Lee Scoggins (herein collectively referred to as the "Union").

STATUTORY PROVISIONS

Appendix E to the Petition reproduces the pertinent text of Section 101(a)(2), Section 101(a)(4) and Section 101(a)(5) of the Labor Management Reporting and Disclosure Act ("LMRDA") (29 U.S.C. §§ 411(a)(2), (4) and (5)). In addition to the statutory provisions reproduced in Appendix E to the Petition, sections 501(a), 501(b) and 609 of the LMRDA (29 U.S.C. §§ 501(a), 501(b), 529) are relevant to consideration of this Petition. These additional statutory provisions are reproduced in Appendix A to this Brief in Opposition.

STATEMENT OF THE CASE

A. The Union Misstates The Record In Asserting That This Case Presents Both Permissible And Impermissible Conduct By Respondents: The Jury Rejected The Union's Argument That Respondents Engaged In Conduct For The Impermissible Purpose Of Supporting Their Election Candidacy.

This case grows out of internal union discipline imposed on Respondents by their political opponents.[1] Respondents were all union officers and members of the Union's Executive Board. Respondent Robert Sandoval was President, Respondent Bill Brooke was Vice President and Respondent Robert Williams was an Executive Board member.

During 1988, Respondents – together with a fourth member of the Executive Board (Bart Wolin)[2] who is not involved in this action – became increasingly concerned about the manner in which Mario Gullo, the Union's Secretary Treasurer, was handling the Union's funds and other assets. As a result of these concerns, Respondents, together with the fourth Board member Wolin, instituted a lawsuit on the Union's behalf seeking an accounting of Union funds by Secretary-Treasurer Gullo.

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[1] Prior to trial, the District Court granted summary judgment on Respondents' claims under section 101(a)(5), finding that the union trial board – composed entirely of Respondents' political opponents – was biased against them (Petition, Appendix C, pp. 37a-39a). The Ninth Circuit affirmed this conclusion (Petition, Appendix A, pp. 24a-25a) and the Union does not challenge this decision.

[2] Four members of the Executive Board constituted a majority of the Board.

After political power on the Executive Board shifted in early 1989,[3] Respondents were accused and convicted of violating Union rules by instituting the lawsuit against Gullo.

In support of this discipline, at trial the Union contended that the lawsuit was instituted merely to support Respondents' candidacy in the upcoming union election because the lawsuit's allegations of misconduct by Gullo were repeated in campaign literature distributed and paid for by the anti-Gullo campaign slate which included Respondents.[4] Respondents, on the other hand, testified that they instituted the lawsuit to protect the interests of the Union and in their capacity as union fiduciaries on the Executive Board (RT Vol. IV, pp. 116-118, 133, 137-139, 146-147; Vol. V, pp. 131, 153-154, 210-214, Vol. VI, pp. 102-103).[5]

The jury was presented with these competing claims. The jury returned a verdict in Respondents' favor on all counts.

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[3] That is, Respondents plus Wolin no longer constituted a four-member majority of the Board.

[4] The Union has never contended that its rules prohibited campaign material discussing either the lawsuit or the misconduct of Gullo which led to the lawsuit. Rather, the Union sought to convince the jury that the lawsuit was instituted purely to support Respondents' candidacy, rather than to remedy Gullo's misconduct, because campaign literature thereafter referred to the lawsuit. Such weight, if any, this inference might have was indisputably for the jury to resolve.

[5] "RT" refers to the Reporter's Transcript in the initial trial. "Exh." Refers to the number or letter of the exhibits introduced at the initial trial.

The trial court set this verdict aside, but the Court of Appeals reinstated it. In a unanimous opinion, the Ninth Circuit held that the evidence "makes clear that plaintiffs had valid cause to believe that Gullo was mishandling union funds" (Petition, Appendix A, p. 18a). Finding valid cause to believe Gullo was mishandling union funds, the Court of Appeals concluded that it was "irrelevant that the plaintiffs referred to the lawsuit against Gullo in the subsequent union election campaign or that they may have benefited politically from it. * * * When an action is brought to recover unlawfully expended union funds or to obtain a statutorily required accounting, a reasonable basis for the action is sufficient, under the LMRDA, to preclude discipline" (Petition, Appendix A, pp. 19a-20a).

The Ninth Circuit held that giving a "mixed-motive" instruction based on *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)[6] was erroneous because the Union's motive for the discipline was undisputed – namely, it was undisputed that the discipline was based on the filing of the lawsuit against Gullo (Petition, Appendix A, pp. 15a-16a). Rather, the question presented was whether *Respondents* were motivated merely to support their election candidacy, in violation of the unions' rule, or were acting as union fiduciaries for the benefit of the union as a whole (id., at pp. 16a-19a). Since the jury

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[6] This instruction was proposed by the Union over Respondents' objections (RT Vol. XI, pp. 56-58). The jury nevertheless returned a verdict in Respondents' favor, rejecting this proffered defense.

had resolved the disputed issues under the other instructions and returned a verdict in Respondents' favor, the Ninth Circuit concluded that giving the "mixed-motive" instruction, proposed by the Union, was harmless error (Petition, Appendix A, pp. 20a-21a).

B. The Union's Claim That Respondents Engaged In Conduct For Both Permissible And Impermissible Purposes Rests On A Presentation Of Only The Evidence Favoring The Union's Contentions Rather Than The Contrary Evidence The Jury Accepted.

In presenting its Petition seeking review, the Union presents only the evidence favorable to its assertion that Respondents acted with an impermissible purpose to support their election candidacy, in violation of the Union's rules prohibiting the use of union funds to support a candidate for union office (Petition, pp. 6-10, 19-21). The Jury did not accept this argument. The Jury accepted the contrary evidence showing that Respondents acted solely to protect the union assets in the face of Secretary-Treasurer Gullo's inability or unwillingness to account for union funds under his control.

Because Respondents are defending the jury's verdict, they are entitled to have the evidence construed most favorably to the verdict. In addressing the specific factual assertions by the Union offered to support its claim that Respondents acted merely to support their election candidacy (Petition pp. 6-10), Respondents present the evidence in that light.

1. *Power of the Executive Board to hire attorneys as part of their fiduciary obligations to the membership as a whole.* The Bylaws allocate the power to hire attorneys and

institute legal proceedings to the Executive Board (Article XVII, Section 1(c), (d) (Exh. 39, p. 24)). The Bylaws provide that the Executive Board may "[p]rovide for the *employment* and *payment* of attorneys," and "[o]n behalf of the Union, its officers, employees and members, to initiate, defend, compromise, settle, arbitrate or release or to pay the costs of any legal proceedings or actions or any nature if, in its judgment, it shall be necessary or desirable to protect, preserve, or advance the interests of the organization." Bylaws, Article XVII, Section 1(c), (d) (emphasis supplied) (Exh. 39, p. 24).

Nothing in the Bylaws allows a membership meeting, attended by a small fraction of the union's entire membership, to overrule a decision by the Executive Board to retain a lawyer to investigate misconduct affecting the entire union (compare Petition, p. 7).[7]

2. *The Executive Board was entitled to a copy of the Coleman settlement that Gullo withheld.* Gullo refused to supply the Executive Board with a copy of the Syble Coleman settlement. Although requested, neither Gullo nor the Union's regular attorneys (Beeson, Tayer & Bodine) were able or willing to supply the Board with a copy

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[7] To the contrary, the Executive Board's obligation as fiduciaries under section 501(a) was to protect the interests of the entire membership of the Union as a whole – including the majority of the membership who did not attend the particular meeting to which Gullo brought his supporters to attempt to derail the investigation against him. See, generally, *Morrissey v. Curran*, 423 F.2d 393, 399 (2d Cir. 1970); *Highway Truck Drivers and Helpers Local 107 v. Cohen*, 182 F.Supp. 608, 617-18 (E.D.Pa), aff'd 284 F.2d 162 (3d Cir. 1960).

of the written settlement agreement containing the specific terms of the settlement. Respondents expressly asked for the documents before voting on the settlement proposal but were told they had to approve the settlement notwithstanding that neither Gullo nor the union's attorney had a copy for the Board to review (RT Vol. IV, pp. 124-125; Vol. V, pp. 147-148, 203-206). Respondents never received a copy of the Coleman settlement from Gullo (RT Vol. V, p. 213 lines 21-22).

The Union's own principal witness testified that the Executive Board was entitled to a copy of this settlement before voting on it (RT Vol. VIII, pp. 149-150). The settlement became public because it was disclosed to the members at the following membership meeting under the Union's normal practice and it was the members at that meeting, not Respondents, who began publicly questioning the settlement (RT Vol. V, pp. 142-144).

3. *A majority of the Executive Board approved the continued investigation of Gullo and the lawsuit pursuant to the express provisions of the Bylaws allowing actions by a majority of the Board both at and outside of meetings.* Because the hiring of Hernandez did not induce Gullo to provide the Executive Board with the financial and other information that concerned the Board, the Executive Board majority approved going ahead with the lawsuit. The Executive Board majority signed a Verification for the Complaint that Hernandez filed initiating the lawsuit against Gullo for an accounting and other relief (RT Vol. IV, pp. 138-139, Exh. 13). On the same date, the Executive Board majority wrote the union's regular attorneys – the Beeson, Tayer & Bodine firm – reaffirming Herndandez' authority (RT Vol. IV, pp. 134-136, Exh. 12):

> You do represent Local 287 on regular union matters, but not on this matter of Mario Gullo. * * * A majority of the Board has decided to seek outside legal and accounting assistance in this investigation.

Shortly after the lawsuit was filed, Gullo produced a check for $11,748.23 made out to the Sick and Death Benefit Fund (Petition, Appendix A, p. 11a). Gullo explained: "We found the money in the safe" (id., p. 11a).

The Bylaws do not require the Executive Board to act only at formal meetings (compare Petition, pp. 8-9, 19-20). The Bylaws allow a majority of the Executive Board to act outside of regular meetings: "On matters requiring action by the Executive Board, when the Executive Board is not in formal session, the Executive Board may act by telegram, letter or telephone" (Article XVII, Section 5 (Exh. 39, p. 26)). The Bylaws further provide that "[s]uch action so taken by a majority of the members of the Executive Board shall constitute action of the Board as though the Board were in formal session" (id.). The written approval by the majority for the continued investigation and the lawsuit (Exhs. 12, 13) complied with these rules.[8]

4. *The Executive Board had the obligation to ensure that Gullo did not violate election rules by campaigning at Fleming Foods.* During the course of the union election, Gullo and his supporters used their official union positions to gain

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[8] In at least one prior case, both the Teamsters Union and the Ninth Circuit had approved actions by a Teamster Local Union outside of formal executive board meetings when the executive board was investigating misconduct by a secretary-treasurer. *Building Material and Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 504, 512 (9th Cir. 1989).

access to the premises of Fleming Foods – a large employer of Union members – to campaign for their reelection, in violation of the Union's election rules (RT Vol. V, pp. 129-130, Vol. VIII, p. 152). Hernandez wrote a letter to Fleming Foods, and the problem stopped.

Again, the Union's principal witness testified that stopping illegal campaigning would be proper action on behalf of the Union as a whole. He testified that, if the executive board found out about illegal campaigning, "they'd take steps to stop it" before the election took place (id. pp. 153-154).[9]

REASONS FOR DENYING THE PETITION

Although couched as a dispute over the application of *Mt. Healthy City School Dist. Bd. of Educ. v. Dole* in the context of the LMRDA, in reality the Petition does no more than take issue with a jury's factual findings against the Union on the detailed and particular facts of this case.

Respondents were all fiduciaries, with a statutory duty under the LMRDA to protect and preserve the union's funds for the benefit of its whole membership. Secretary-Treasurer Gullo's wrongdoing and failure to account for union funds is undisputed. A majority of the

[9] In any event, Respondents had arranged with Hernandez that he would work on a separate contingency fee basis with them for disputes involving Fleming Foods rather than charge the Union for legal services concerning Fleming Foods (RT Vol. V, pp. 130-131). The jury, of course, was free to credit Respondents' evidence on this point and apparently did so.

Executive Board indisputably authorized the lawsuit against Gullo and the investigation of Gullo by independent attorney Hernandez to remedy Gullo's misconduct. Indeed, the lawsuit had the immediate benefit of the recovery of $11,748.28 which Gullo claimed to have suddenly found "in the safe" (Petition, Appendix A, p. 11a).

Notwithstanding the undisputed factual basis for Respondents' concerns and the immediate benefit the lawsuit brought to the union, Respondents were subjected to union discipline for the institution of the lawsuit to remedy Gullo's failure to account for union funds – a lawsuit that represented the very kind of fiduciary responsibility the LMRDA seeks to encourage. This disciplinary action was imposed in undisputed violation of the due process section of the LMRDA,[10] by Respondents' political opponents – the supporters of Mario Gullo against whom the lawsuit had been brought. There was also no dispute as to the motive for the discipline – the charge and the conviction were premised explicitly on the institution of the lawsuit against Gullo.

This case, therefore, presents nothing more significant than a case – all too common – where a union has used its internal disciplinary process to retaliate against its political opposition in order to quell dissent and punish challenge to incumbent union officials. The Teamsters Union is no stranger to this story, as it currently operates under a consent decree designed to afford additional protection against the kind of abuse represented in this case.

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[10] See footnote 1, supra.

While the Union denied wrongdoing and sought to justify the discipline under its election rule prohibiting use of union funds to support a candidate in union elections, the jury in this case concluded that Respondents were the victims of exactly the type of retaliation prohibited by the LMRDA and were not disciplined for violating the union's election rule. That conclusion resolved all the relevant issues in this case without reference to the "mixed-motive" situation represented by *Mt. Healthy*. The only question these facts presented was whether Respondents instituted the lawsuit for the benefit of the union to remedy Gullo's misconduct or merely as a tactic to support Respondents' candidacy in the upcoming union election.

Nothing in the Petition shows that this case presents anything other than a factual dispute as to Respondents' purpose in instituting the lawsuit against Gullo, which was resolved by the jury in Respondents' favor. The Petition represents nothing more than a rehash of the factually-based contentions the Union urged upon the jury and which the jury ultimately rejected.

A. This Petition Does Not Present A Case Involving The Enforcement Of Union Rules Or "Mixed-Motives" Because The Jury Rejected The Union's Claim That Respondents Violated Any Union Rule.

The Union rests its Petition on the idea that Respondents indisputably used union funds for both permissible and impermissible purposes in violation of union election rules prohibiting the use of union funds to support a candidacy in a union election (Petition, pp. 19-26). This

contention rests on entirely mistaken premises that Respondents violated any union rule or that the Union acted with "mixed-motives". Rather, the Union's only motive for the discipline was the charge that Respondents violated the union's rules by suing Gullo. The Jury rejected the Union's contention that Respondents violated its rules. As the Ninth Circuit noted – and the Union does not dispute – Respondents were fiduciaries with a statutory duty under section 501(a) and 501(b) of the LMRDA to take action on behalf of the Union as an entity in the face of Gullo's misconduct (Petition, Appendix A, 17a-19a).

a. The Jury's determination that Respondents' purpose in instituting the lawsuit was to protect the interests of the Union and not to support their candidacy in the union election disposes of the Union's principal contention in this Court (Petition pp. 19-22). Thus, this case does *not* present the question whether Respondents acted for both permissible purposes – i.e., protecting the Union's finances – and impermissible purposes – i.e., support of their candidacy in the upcoming union election. Instead, this case presents *only* the factual issue whether Respondents had valid cause to believe Gullo was misusing union funds – as both the Jury and the Ninth Circuit found was the case.

This Court is not the place to review factbound determinations of motive and purpose, which depend on the particular facts of this case and the credibility of Respondents' own testimony that they were acting to benefit the union and not to support their candidacy in the upcoming union election. Respondents' purpose was disputed and fully-litigated at trial. The Jury accepted Respondents

testimony that they were acting for the benefit of the Union not to support their candidacy in the election. The Union's characterization of Respondents' actions as violating the union's election rules (Petition pp. 19-22) simply repeats the arguments it made to the Jury in support of the claim that Respondents were acting to support their candidacy in the upcoming union election and which the Jury rejected based on substantial contrary evidence.

b. This case also does not raise any question as to the Union's right to enforce reasonable union rules under *United Steel Workers v. Sadlowski*, 457 U.S. 102 (1982) (see Petition, pp. 22-24). The Ninth Circuit did not dispute the Union's right to have reasonable rules governing the use of union funds (Petition, Appendix A, p. 19a). As the Ninth Circuit held, however, under the instructions given, the Jury found that Respondents had not violated any such union rule (Petition, Appendix A, pp. 20a-21a). Whether Respondents violated any Union rule was a disputed factual issue for the Jury to resolve.

Thus, the issue was not whether the election rule was valid under the "two-tier" test established in *Sadlowski*. The abstract validity of a rule prohibiting use of union funds to support candidates in union elections was acknowledged by everyone.[11] The issue, resolved by the

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[11] Thus, the policy of section 401(g) (Petition, p. 23 n. 8) is irrelevant. In passing, however, Respondents note that neither this Court, the lower courts, nor the Department of Labor has extended section 401(g) to include election-related lawsuits brought in good faith. *United Steel Workers v. Sadlowski*, supra, 457 U.S. at 119 and 119-121 (part III of opinion: "The outsider

Jury, was whether or not Respondents in fact violated any such rule on the particular facts of this case.

c. This case does not present any question respecting the accepted framework for "mixed-motive" cases established in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (see Petition pp. 24-26). The *Mt. Healthy* test requires showing that, where two reasons for discipline were present at the time of the decision, one legal and one illegal, the same action would have been taken in any event based on the independent alternative legal reason standing alone (see Petition, pp. 24-26, 27).[12]

However, as the Ninth Circuit held, *Mt. Healthy* was inapplicable because the *Union's* motive for the disciplinary action was undisputed, not "mixed" (Petition, Appendix A, pp. 15a-18a). The only claimed motive for the

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rule would clearly violate [section 101(a)(4)] if it prohibited union members from accepting financial or other support from nonmembers for purpose of conducting campaign-related litigation"); *Retail Clerks Union, Local 648 v. Retail Clerks International Association*, 299 F.Supp. 1012, 1024 (D.D.C. 1969); 29 C.F.R. § 452.77 and n. 39.

[12] In this respect, the Union seriously misstates the *Mt. Healthy* test in asserting that it involves merely proof of "a permissible basis for [the] decision" (Petition, p. 24, subparagraph c, second paragraph, last sentence). This Court has regularly noted that proof under *Mt. Healthy* requires more than a "permissible basis" for disciplinary action:

> As we have observed, "proving that the same decision would have been justified . . . is not the same as proving that the same decision would have been made." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 360 (1995), quoting from *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989).

discipline was the stated one – the filing of the lawsuit against Gullo, which at trial the Union claimed was instituted to support Respondents' candidacy in the upcoming election (Petition, Appendix A, pp. 15a-16a). The only disputed question of motive presented by the case was *Respondents'* motive in instituting the lawsuit: namely, were they acting for the benefit of the Union as a whole or merely to support their election candidacy? (Petition, Appendix A, pp. 16a, 20a-21a). If the former, Respondents' actions were protected by the LMRDA; if the latter, Respondents could be subject to union discipline for violating union rules (Petition, Appendix A, pp. 17a-20a). The jury was presented with this issue on the particular facts of this case and resolved the issue in Respondents' favor (Petition, Appendix A, pp. 20a-21a).

Although the Petition argues that Respondents violated other union rules (Petition pp. 8-10, 19-21), Respondents argued these purported violations to the Jury in support of its claim that Respondents violated its election rule. The Jury, as discussed above, rejected this argument.

i. Even assuming that the jury's verdict is not dispositive of the issue of these other alleged violations, the Union failed to present these alleged violations as independent alternative grounds for disciplinary action in the context of *Mt. Healthy*. These rule violations were presented to the jury only as evidence that Respondents violated the union's election rule. The Union offered no separate instruction on these other alleged rule violations and made no argument in the court of appeals that the jury should have been instructed on these other alleged violations. The only rule violation on which the jury was instructed was the rule prohibiting union officers from

using union funds to support their candidacy in elections (RT Vol. XII, pp. 138-140).

ii. In addition, none of these alleged violations could have properly supported a "mixed-motive" defense.

The internal union charges filed against Respondents were limited to the filing of the lawsuit (Exh. 21). Since these alleged violations were not charged before the Union at the time of the disciplinary action, the Union could not have imposed discipline on these alternative grounds as independent alternative reasons for the discipline. As this court has previously recognized, the "mixed-motive" analysis in *Mt. Healthy* is simply inapplicable to uncharged rule violations that could not have been part of the motivation for the disciplinary action at the time the action was taken (*McKennon v. National Banner Publishing Co.*, supra, 513 U.S at 360).[13]

d. Once the jury resolved the question of *Respondents'* motive, Ninth Circuit properly concluded that giving a further instruction on the *Union's* "mixed-motive" was erroneous since, in this particular case, the Union's motive was not "mixed" at all. Nevertheless, since the jury rejected this defense as well under instructions proposed by the Union itself (Petition, Appendix A, pp. 20a-21a), the error was harmless, because instructing on a

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[13] The *Mt. Healthy* "mixed-motive" situation cannot arise based on "knowledge that [the defendant] did not have" at the time of the decision (*McKennon v. National Banner Publishing Co.*, supra, 513 U.S at 360). Section 101(a)(5)(A) of the LMRDA also prohibits all discipline unless the member was "served with written specific charges" before the hearing.

"mixed-motive" affirmative defense could "only have helped the defendants" (Petition, Appendix A, p. 21a footnote 13). The Union does not appear to take issue with this obvious conclusion.

In short, the only issue properly presented in this case is the substance of the Jury's verdict finding that Respondents acted for the benefit of the Union as a whole rather than merely to support their candidacy in the upcoming union election. This presents a purely factual question which was resolved by the jury and reviewed by the Ninth Circuit. This purely factual issue does not warrant further review in this Court.

B. There Is No Conflict In The Circuits As To The Proper Standard Under *Mt. Healthy* In True Mixed-Motive Cases.

Even if the Union was correct in its belief that this case involves "mixed-motives" within the meaning of *Mt. Healthy*, there is no actual conflict in the Circuits on the application of the *Mt. Healthy* test (Petition, pp. 28-29). No Circuit has held *Mt. Healthy* to be inapplicable to true "mixed-motive" cases under the LMRDA. Rather, the cases cited by the Union

(a) have held (like the Ninth Circuit below) that the evidence did not show that a "mixed-motive" was actually present (*Petramale v. Laborers Local 17*, 736 F.2d 13 (2d Cir. 1984), cert. denied, 469 U.S. 1087 (1984); *Bradford v. Textile Workers Local 1093*, 563 F.2d 1136, 1143 (4th Cir. 1977)), or

(b) did not consider *Mt. Healthy* at all (*Kuebbler v. Cleveland Lithographers & Photoengravers Union Local 24-P*, 473 F.2d 359 (6th Cir. 1973); *Aircraft Mechanics v. Transport Workers Union of America*, 98 F.3d 597 (10th Cir. 1996)), or

(c) adapted the burden of proof allocation of *Mt. Healthy* in contexts not involving "mixed-motives" (*Black v. Ryder/P.I.E. Nationwide*, 970 F.2d 1199 (6th Cir. 1992)).[14]

No Circuit has rejected *Mt. Healthy* in the LMRDA context when the facts demonstrated a true "mixed-motive" case. Absent a conflict in the Circuits, no substantial issue is presented for review in this court as to how *Mt. Healthy* should be applied in cases presenting true "mixed-motives" for union discipline.

C. Because The Jury Rejected The "Mixed-Motive" Defense At Trial Pursuant To An Instruction Offered By The Union Itself, This Court's Consideration Of The Scope Of A "Mixed-Motive" Defense Under The LMRDA Would Be Hypothetical And Could Not Alter The Outcome Below.

Even if a conflict in the Circuits existed, any resolution of the conflict would not affect the outcome in this case.

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[14] *Black v. Ryder*, in particular, was not a "mixed-motive" case. *Black* involved the single issue whether the member had engaged in protected conduct (i.e., handbilling to protest union corruption) or unprotected conduct (i.e., violent intimidation of persons coming to the union hall). *Black* applied *Mt. Healthy* only to the extent that it imposed the burden of proof on the union to show that it was enforcing a reasonable union rule to protect its operations from disruption through unlawful threats of violence.

In this case, the Union itself proposed the language of the *Mt. Healthy* instruction given to the jury over Respondents' objections (RT Vol. XI, pp. 56-58). The jury rejected the defense despite an instruction that Respondents felt was overly-favorable to the Union.[15] Petition, Appendix A, p. 21a and footnote 13.

Whatever this court might decide on the "mixed-motive" issue, the outcome of this case would be the same. If the instruction should not have been given because – as the Ninth Circuit found – the Union's motive was undisputed, not "mixed", the instruction could only have helped the Union by providing it a better defense than the Union was entitled to receive. If the instruction proposed by the Union was properly given and properly stated the elements of a "mixed-motive" case under the LMRDA, the jury nevertheless rejected the defense. Finally, if the instruction misstated the elements of a "mixed-motive" defense more favorably to the Union than *Mt. Healthy* would allow, the jury's verdict in Respondents' favor rendered such error harmless as well.

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[15] As Respondents argued, the actual instruction given (Petition, Appendix F, p. 46a) did not conform to the appropriate "same decision" language in *Mt. Healthy*. Instead, the instruction directed a defense verdict if "there was a reasonable standard for the discipline of plaintiffs under the circumstances of this case" (id., p. 46a, second paragraph). Such language improperly directed a defense verdict merely on the basis that discipline would have been justified, rather than showing it would have been actually imposed. See *McKennon v. Nashville Banner Publishing Co.*, supra, 513 U.S. at 360.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Labor Management Reporting and Disclosure Act, Section 501(a) (29 U.S.C. § 501(a)).

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve and such person of liability for breach of the duties declared by this section shall be void as against public policy.

Labor Management Reporting and Disclosure Act, Section 501(b) (29 U.S.C. § 501(b)).

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated

the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

Labor Management Reporting and Disclosure Act, Section 609 (29 U.S.C. § 529).

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.